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No. 84-1503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, *et al.*,
Petitioners,

v.

ANNIE LEE HUDSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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This brief, *amicus curiae*, is filed by the National Education Association (NEA) with the consent of the parties, pursuant to the Rules of this Court.

INTEREST OF *AMICUS CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of

affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States.

One of the principal objectives of NEA and its affiliates is to secure improvements in the terms and conditions of employment of educational employees. Toward this end, they engage in collective bargaining pursuant to state public employee collective bargaining statutes, or, in the absence of express statutory authorization, pursuant to judicially sanctioned *ad hoc* arrangements agreed to between a particular affiliate and employer. Where permitted by state law, as in Illinois, NEA affiliates seek to include in their collective bargaining agreements agency shop provisions (*i.e.*, provisions which require employees in the bargaining unit who choose not to join the exclusive representative to pay a fee to it.)[1] Although holding that provisions of this type are permissible under the United States Constitution, the Court has established a basic limitation on the union's right to expend the compelled contributions that it receives: an exclusive representative may expend such fees, over objection, for activities that are "related to" collective bargaining, but the expenditure of fees for political and ideological activities that are not so related abridges the First Amendment rights of objecting fee payers.

Recognizing the difficulties that could be involved in judicial enforcement of the line between constitutionally chargeable and nonchargeable expenditures, the Court has encouraged unions to adopt voluntary procedures by which objectors would be afforded an internal union remedy. Although the narrow issue before the Court in this case is whether a particular type of internal union procedure is constitutional, the Court's decision is likely to have implications for all internal union procedures, including the procedure used by NEA. Accordingly, NEA has a substantial interest in the outcome.

[1] The precise terminology used to designate this type of cost-sharing arrangement varies from jurisdiction to jurisdiction. It is referred to as a "proportionate share payment" in Illinois, and as a "fair share fee," a "service fee," etc. in other jurisdictions. It is referred to most commonly as an "agency shop fee," and we use that designation here.

SUMMARY OF ARGUMENT

It is permissible under the Constitution for an exclusive representative to expend agency shop fees, over objection, for activities that are "related to" collective bargaining, but the expenditures of such fees for political and ideological activities that are not so related abridges the First Amendment rights of objectors. The Court has encouraged unions to adopt internal procedures for distinguishing between chargeable and nonchargeable expenditures, and has indicated that the objective of these procedures should be to protect the First Amendment right of objecting fee payers to refrain from financing nonchargeable activities without depriving the union of its right to collect and expend fees for activities that are related to collective bargaining. (Part A)

In *Ellis v. Railway Clerks*, 52 U.S.L.W. 4499 (April 25, 1984), the Court held that the internal union procedure at issue (*i.e.*, a "pure rebate system") was constitutionally impermissible, but identified two "acceptable alternatives," including interest-bearing escrow accounts. Given the constitutional interest at stake in *Ellis*, the Court must at the very least have intended to sanction a 100% escrow procedure such as that used by petitioners: since the objector's entire agency shop fee is kept in an escrow account until he or she has exhausted all avenues available to challenge the amount charged, the procedure eliminates *any* possibility that the union will be able "to commit dis-

senters' funds to improper uses even temporarily." *Ellis*, *supra*, 52 U.S.L.W. at 4501. But there is nothing in *Ellis* to suggest that a 100% escrow procedure is constitutionally necessary. To the contrary, both the logic and language of the Court's decision indicate that an escrow procedure pursuant to which an amount less than the objector's entire fee is placed in escrow likewise is constitutional. (Part B)

NEA has adopted a procedure of the latter type. This procedure, which uses an impartial arbitrator to determine the appropriate portion of the objector's fee that is to be placed in escrow, provides adequate protection against temporary misuse and is more responsive than is a 100% escrow procedure to the Court's concern that the union have timely access to that portion of the objector's fee that it is entitled to expend. The use of an arbitrator to distinguish in the first instance between chargeable and nonchargeable expenditures does not render the NEA procedure constitutionally unacceptable. There is nothing in this Court's decisions to suggest that a decisionmaker must be disqualified as impermissibly biased because he or she is selected and paid by the union, or that an arbitrator is for any other reason not qualified to make the categorization in question. (Part C)

ARGUMENT

THE 100% ESCROW PROCEDURE USED BY PETITIONERS IS CONSTITUTIONALLY SUFFICIENT, BUT NOT CONSTITUTIONALLY NECESSARY. A LESS THAN 100% ESCROW PROCEDURE, SUCH AS THAT USED BY NEA, ACCOMMODATES THE INTERESTS IDENTIFIED BY THE COURT IN AGENCY SHOP CASES

A. The Interests Identified by the Court in Agency Shop Cases

The Court's decisions establish that it is constitutional to require members of a bargaining unit, over their objection, to support activities of the exclusive representative that are related to collective bargaining, but that it abridges the First Amendment rights of objecting fee payers to require them to help finance political and ideological activities that are not so related. Whatever the proper line may be between chargeable and nonchargeable expenditures, some procedure is required to assure that objectors can be charged for the former, without infringing on their right to refrain from financing the latter. Recognizing the difficulties that could be involved in judicial enforcement of this line, the Court in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 122, 124 (1963), "encourage[d] . . . unions to consider the adoption by their membership of some voluntary plan" for the "vindication of the rights and accommodation of interests here involved." The Court reaffirmed this position in *Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977), noting that "it would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy.' "

The Court has identified several interests that must be accommodated in fashioning these internal union proce-

dures. In order to pass constitutional muster, the procedure must, of course, protect the objecting employee's First Amendment right to refrain from financing activities unrelated to collective bargaining. In *Abood*, the Court emphasized the necessity of "preventing compulsory subsidization of ideological activity by employees who object thereto," 431 U.S. at 237. In his concurring opinion, Justice Stevens suggested that this included the right of objectors not to have their fees "used, even temporarily, to finance [non-chargeable] activities." *Id.* at 244.

At the same time, the Court repeatedly has made clear that the exclusive representative also has a legitimate and important interest at stake: the right to collect and expend objecting employees' fees for activities that *are* related to collective bargaining. In recognition of that interest, the Court has cautioned against overbroad remedies that "encroach[] on the legitimate activities or necessary functions of the union," *International Association of Machinists v. Street*, 367 U.S. 740, 774 (1961), and has approved only those remedies protective of objectors' rights that are carefully tailored "lest the important functions of labor organizations . . . be unduly impaired." *Allen, supra*, 373 U.S. at 120. As the Court put it in *Abood*:

> [T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.

431 U.S. at 237.

The Court also has expressed the hope that these internal union procedures would provide for the expeditious resolution of the claims of objecting fee payers, with the result that "prolonged and expensive litigation might . . . be averted." *Allen, supra*, 373 U.S. at 123.

B. *Ellis v. Railway Clerks*

Pursuant to this encouragement from the Court, NEA and other unions adopted internal procedures, but it was not until *Ellis v. Railway Clerks*, 52 U.S.L.W. 4499 (April 25, 1984), that the Court offered any specific guidance as to the type of procedure that would pass constitutional muster. Embracing the position taken by Justice Stevens in his concurring opinion in *Abood*, the *Ellis* court indicated for the first time that a "pure rebate approach" (*i.e.*, the union's "exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place") is not a constitutionally acceptable approach.[2] As the Court explained, the pure rebate approach, even with interest added to the amount ultimately refunded, is impermissible because it gives the union "an involuntary loan for purposes to which the employee objects". *Id.* at 4501. The Court then identified two alternative procedures that would be acceptable:

> [T]here are readily available alternatives [to a pure rebate approach], such as *advance reduction of dues and/or interest-bearing escrow accounts*, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.

Id. (emphasis added).

In the instant case, the Court is called upon to develop the law regarding one of the "acceptable alternatives" identified in *Ellis*. Specifically, the issue is whether petitioners' 100% escrow procedure—pursuant to which the objector's entire agency shop fee is kept in an escrow account until he or she has exhausted all avenues available to challenge the amount charged—is constitutional. Inasmuch as this arrangement eliminates *any* possibility

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[2] Prior to *Ellis*, there was "language in this Court's cases to support the validity of a [pure] rebate program." *Id.* at 4501.

that the union will be able "to commit dissenters' funds to improper uses even temporarily," *Ellis, supra*, 52 U.S.L.W. at 4501, the Court at the very least must have intended to sanction a 100% escrow procedure when it stated in *Ellis* that interest-bearing escrow accounts are an "acceptable alternative." To the extent that the lower court concluded otherwise, its holding is squarely at odds with *Ellis* and must be reversed.[3]

But it will not undo the mischief caused by the lower court's decision for the Court simply to reaffirm what already is evident from the plain language of *Ellis*. The lower court's decision implicates a subsidiary question that was not directly addressed in *Ellis*: does the Constitution *require* a 100% escrow procedure, or can a procedure pass constitutional muster if it provides for an amount that is less than the objector's entire fee to be placed in escrow, and if this amount is determined, in the first instance, other than by a court or governmental agency? Although the lower court indicates that the answer to this latter question is no, its analysis is flawed. We will in the remainder of this brief demonstrate that a less than 100% escrow procedure, such as that used by NEA, is constitutionally permissible and, indeed, comes far closer to accommodating the interests identified by the Supreme Court in agency shop cases than does a 100% escrow procedure.

Before turning to the specifics of the NEA procedure, it is important to point out that, although *Ellis* establishes that a 100% escrow procedure is constitutionally *sufficient*, there is nothing in *Ellis* itself to suggest that such a procedure is constitutionally *necessary*. Indeed, the decision suggests precisely the contrary. Viewed in

[3] The lower court also found petitioners' procedure wanting in that the terms of the escrow are "left entirely up to the union" and "[t]he union might decide . . . to forego a high interest rate in order to punish dissenters. . . ." Slip op. at 14-15. As petitioners point out in their brief, however, this objection does not implicate any constitutional issue.

terms of the constitutional interest at stake in *Ellis*, the principal distinction between a 100% escrow procedure and a less than 100% escrow procedure is that the latter, unlike the former, does not *totally* eliminate the possibility that the union will be able "to commit dissenters' funds to improper uses even temporarily." *Ellis, supra*, 52 U.S.L.W. at 4501. But the other "acceptable alternative" explicitly approved by the court—*i.e.*, an advance reduction procedure—makes it clear that the existence of this possibility is not sufficient in and of itself to render an escrow procedure constitutionally invalid. By definition, an advance reduction procedure requires that a determination of expenditures not chargeable to objectors be made before or during a union's fiscal year, *i.e.*, the determination is based on anticipated expenditures.[4] Given that absolute protection against temporary misuse is obtainable only after the fiscal year has ended and the union's accounts have been audited, the Court could not have sanctioned an advance reduction of the agency shop fee as an acceptable alternative if any possibility of a discrepancy between anticipated and actual expenditures were sufficient to trigger the involuntary loan rationale.[5] Put another way, recognition of an advance reduction procedure as a constitutionally acceptable alternative necessarily forecloses the argument that objecting fee payers enjoy a right to be

[4] This is true whether the determination is made by the union itself, by an arbitrator or by a court.

[5] Since *Ellis*, the Court has reaffirmed the constitutionality of an advance reduction procedure. In *White Cloud Education Association v. Board of Education*, 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal dismissed sub nom. Jibson v. White Cloud Education Association*, 53 U.S.L.W. 3268 (Oct. 9, 1984), and *Kempner v. Local 2077, AFL-CIO*, 126 Mich. App. 452, 337 N.W.2d 354 (1983), *appeal dismissed*, 53 U.S.L.W. 3323 (Oct. 29, 1984), the Court dismissed constitutional challenges to advance reduction procedures where the union in good faith determined the amount of the advance reduction. Summary decisions by this Court are adjudications on the merits. *E.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975).

free even from the theoretical possibility that their funds will be used temporarily for nonchargeable purposes.

The foregoing conclusion is buttressed by the *Ellis* Court's observation that advance reduction and escrow accounts would place "only the slightest additional burden, if any, on the union." 52 U.S.L.W. at 4501. The Court hardly would have considered a 100% escrow—which effectively would deny unions the use of any agency shop fees collected from objecting employees for an extended period of time—a non-existent or only slight burden. Nor is it likely that the Court intended in the same sentence to establish two procedures with vastly different consequences for the parties involved. A far better reading of *Ellis* is that the Court approved two substantially equivalent alternatives, which differ only in whether the objectors' money anticipated to be expended for nonchargeable purposes is returned to them in advance for their own use, or held in escrow, with interest, pending a final determination of actual expenditures after the end of the union's fiscal year.

In short, the teaching of *Ellis* is this: a 100% escrow procedure is constitutionally sufficient, but it is not constitutionally necessary. An internal union procedure that provides for the escrowing of less than the full amount of the objector's fee can, if properly fashioned, likewise be an "acceptable alternative."

C. *The NEA Procedure*

In order to demonstrate how a procedure which involves escrowing less than 100% of the fee adequately can accommodate the interests identified by the Court in agency shop cases, we describe one such procedure here. This procedure, which is used by NEA and its affiliates in several states, including Illinois, operates as follows.[6]

[6] The procedure actually is adopted by the local affiliate and used to determine the refundable portion of the total agency shop fee

Promptly after the end of each fiscal year, a member of the National Academy of Arbitrators, who has experience in public sector labor relations, is selected by NEA to serve as the Agency Shop Impartial Umpire. The function of the Umpire is to determine the percentage of NEA's dues income that NEA expended during the just ended fiscal year for purposes related to collective bargaining.[7] In making this determination, the Umpire is to be guided by the decisions of this Court, as elaborated upon by the lower courts. And, of course, the Umpire has access to all of the financial and other records of NEA.

If an employee who is required to pay an agency shop fee for a particular fiscal year files a written notice with the exclusive representative objecting to the use of his or her fee for activities unrelated to collective bargaining, NEA promptly establishes an interest-bearing escrow account in his or her name.[8] The amount escrowed from

paid to it by objecting employees. This fee includes payment to the local affiliate and also payments to its state and national parent organizations. As explained *infra*, the procedure functions in essentially the same fashion at all three levels. For purposes of simplicity in discussion, we refer in text to the "NEA procedure," and focus on its operation at the NEA level.

[7] A similar procedure is followed by the NEA state affiliate to determine the chargeable portion of its expenditures from dues income for the fiscal year in question. Because analysis by an impartial third party of the actual expenditures of each of the thousands of local affiliates that have bargained agency shop provisions would entail excessive delay, expense and burden, these affiliates are presumed to have expended the same proportion of their dues income on "related" activities as was determined for the state affiliate. Objecting employees are adequately protected by this presumption since local affiliates—with only local responsibilities—invariably spend at least as much, and probably more, of their dues income for activities related to collective bargaining than do state affiliates.

[8] The objection notice may be phrased in general terms (*i.e.*, an objection to the expenditure of the fee for impermissible purposes) and need not identify specific expenditures.

each fee payment[9] is equal to the percentage that the Umpire determined to have been expended for "unrelated" activities during the preceding fiscal year, plus a 5% "cushion."[10] When the fiscal year ends, the impartial review procedure described previously is again followed in order to determine the percentage of NEA's dues income that, in fact, was expended during the year for purposes related to collective bargaining.[11] The objecting employee then receives a copy of the Umpire's report (explaining how the determination was made) and a check from his or her escrow account in an amount that is equal to the "refundable" portion of the fee paid during the prior fiscal year, plus accrued interest.[12] Any money remaining in the escrow account—which would be attributable to chargeable expenditures—is paid to NEA.[13] If a fee payer wishes to challenge the amount of a refund as inadequate through an available adminis-

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[9] The vast bulk of NEA's membership dues and agency shop fees is paid in periodic (*e.g.*, bi-weekly) installments through payroll deduction systems.

[10] Thus, for instance, if the Umpire determined that 11% of NEA's dues income was expended for "unrelated" activities during the 1984-85 fiscal year, 16% of the 1985-86 fee would be escrowed for each objecting employee and only 84% of the fee would be available for use by NEA.

[11] Objecting employees, who previously have been sent an explanation of the procedure, related explanatory materials and copies of the relevant budgets, are free to make written submissions directly to the Umpire.

[12] This check is to be mailed not later than three months after the end of the NEA fiscal year. This modest delay is necessary to enable NEA's independent auditors to complete their analysis and submit an audit to the Umpire. The entire amount of all fees for the next fiscal year which are collected from an objector before the Umpire's report has issued are placed in escrow pending completion of the report.

[13] If the "refundable" portion for a given fiscal year exceeds the amount in an objecting employee's escrow account, he or she is paid the excess amount, plus accrued interest, from NEA's treasury funds.

trative or judicial proceeding, the unrefunded portion of the fee is retained in his or her escrow account (rather than being paid to NEA) until all appeals have been completed.

The NEA procedure accommodates the two interests identified by this Court in *Abood* and *Ellis*. First, it protects the rights of objecting employees. Because the filing of an objection triggers the prompt escrowing of 5% more than the portion of the objector's fee that presumptively would be expended during that fiscal year for "unrelated" activities (*i.e.*, the portion that *was* so spent during the prior fiscal year), it is highly improbable that any of the objector's monies will be spent for such activities. Thus, the concerns of the First Amendment are vindicated.[14] At the same time, the NEA procedure provides the exclusive representative with access to a portion of objectors' fees that is appropriately keyed to the costs of chargeable activities at a time when that money is needed to pay those costs.[15] Moreover, if the proportion of dues income actually expended on activities related to collective bargaining were to exceed the projected propor-

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[14] If the final refund exceeds the amount escrowed, *see* n.13, *supra*, NEA will to the extent of the difference be subject to the concern over impermissible temporary use. But as the Court noted with regard to a slightly different point in *Allen*, "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required." 373 U.S. at 122. *See also Ellis*, 52 U.S.L.W. at 4505 n.15 (relying on *Allen* in rejecting claim that heightened standard of proof should apply where objectors' First Amendment interests are implicated).

[15] If the fees were not available, the exclusive representative would have less money with which to perform its collective-bargaining related activities, or alternatively, dues-paying members —by definition a majority of the bargaining unit—would have to pay more than their fair share to support such activities. This latter alternative in turn would diminish the expressive rights of the majority of employees, since their payments to the union would be depleted to cover the costs incurred in the representation of free riders. The Court has made clear that such a result is disfavored. *See Street, supra*, 367 U.S. at 773; *Allen, supra*, 373 U.S. at 122.

tion (*i.e.*, the proportion expended during the prior fiscal year), the escrow arrangement would make it unnecessary for NEA to engage in a costly and time-consuming effort to recoup from objecting fee payers the additional amount to which it would be entitled.

The NEA procedure is, in addition, the type of "simple procedure" that may avoid "prolonged and expensive litigation." *Allen, supra*, 373 U.S. at 123. By assigning an experienced arbitrator the task of identifying in the first instance those activities of the exclusive representative that are related to collective bargaining, the procedure provides for an expedited, inexpensive and impartial determination without burdening the courts. If an objecting employee decides to appeal from the Umpire's determination, the reviewing court or agency will have before it a reasoned judgment based on the record of actual expenditures, which may be accorded "great weight," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974), *quoted in Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 743-44 n.22 (1981).[16]

The court below presumably would disapprove this aspect of the NEA procedure because of its belief that an arbitrator who is selected and compensated by the exclusive representative cannot possibly be impartial.[17] This conclusion simply is wrong. As a general matter, arbitrators—and especially individuals of the stature in-

[16] A court might elect to refrain from adjudicating a challenge to the portion of the fee being escrowed until after the employee has exhausted his or her remedies under the NEA procedure. *Cf. Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981).

[17] Because the Seventh Circuit seemingly believed that petitioners' procedure somehow foreclosed judicial review (slip op. at 10-11), it is not certain that the lower court would have rejected the NEA procedure, which expressly contemplates the right to such review. Nonetheless, the court's challenge to the impartiality of the arbitral process itself applies equally to the NEA procedure. Accordingly, we demonstrate the shortcomings of that challenge.

volved here[18]—presumptively can be expected to render impartial decisions. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982). To be sure, under the NEA procedure, the union—out of necessity—selects and compensates the arbitrator, but the Court never has suggested that a decisionmaker may be disqualified as impermissibly biased because of the possibility that he might seek to curry favor with one side or the other through his decision. Indeed, were this sufficient to establish unconstitutional bias, all adjudicators would have to be granted life tenure. *Cf. Dugan v. Ohio*, 277 U.S. 61 (1928); *Hortonville School District v. Hortonville Education Association*, 426 U.S. 482 (1976).

The court of appeals' reliance on *McDonald v. City of West Branch*, 52 U.S.L.W. 4457 (April 18, 1984), similarly is misplaced. In *McDonald*, the Court declined to give preclusive effect to labor arbitration awards in civil rights actions brought pursuant to 42 U.S.C. § 1983. But the conclusion that arbitrators may not *finally* de-

[18] The person who has been selected to serve as the NEA Umpire is Arvid Anderson. Mr. Anderson is a nationally recognized labor-management arbitrator who, since 1967, has been Chairman of the New York City Office of Collective Bargaining. Prior to assuming that position, he was a Commissioner and Executive Secretary of the Wisconsin Employment Relations Commission. Mr. Anderson is both an attorney and an economist. NEA's state affiliates have selected individuals of comparable stature to serve as their umpires. For example, the NEA affiliate in Illinois—the Illinois Education Association—also uses Mr. Anderson. And the Umpire for the New Jersey Education Association, which is the NEA affiliate in that state, is Eric Schmertz. Mr. Schmertz, who has been a labor-management arbitrator for more than 25 years, is Dean of the Hofstra University School of Law. He has served as a member of both the New York City Office of Collective Bargaining and the New York State Board of Mediation.

In selecting umpires, NEA and its affiliates limit themselves to members of the National Academy of Arbitrators. These men and women have a professional interest in their reputation for impartiality, and hardly would be willing to compromise that reputation for a particular assignment.

termine issues of constitutional magnitude surely does not mean that it is impermissible for arbitrators to pass upon matters affecting constitutional rights. To the contrary, the plain import of *McDonald* is that arbitrators may adjudicate such matters, but the party adversely affected may not be estopped from challenging arbitral determinations in federal court. *See* 52 U.S.L.W. at 4460 n.13.

Moreover, the fact that an objector's challenge is couched in First Amendment terms should not be permitted to obscure the essential nature of the dispute. The ability to determine what percentage of a union's budget is chargeable does not require familiarity with constitutional doctrine, but rather an understanding of collective bargaining and the purpose of various union activities. This understanding is much more likely to be found among arbitrators, who regularly interpret collective bargaining agreements, than among school boards,[19] other governmental officers, or federal courts.

In sum, the Constitution does not require that an exclusive representative be denied the use of all fees from objecting employees pending a judicial or state agency determination of the amount to which it is entitled. A procedure such as that used by NEA, pursuant to which an impartial arbitrator determines the portion of the

[19] There are numerous problems inherent in the lower court's suggestion that the line between chargeable and nonchargeable expenditures be determined in an "administrative hearing before the Board of Education . . ." (slip op. at 13). In light of the adversarial nature of the collective bargaining process, it would be manifestly inappropriate for the union to reveal to the school board in advance the precise manner in which it intends to allocate its resources. Further, a school board might well not be neutral in making this determination, inasmuch as a restrictive approach *vis-a-vis* chargeable expenditures would adversely impact the resources available to the union. And, finally, the additional administrative burden that would be imposed on the school board could cause it to resist the inclusion of an agency shop provision in the collective bargaining agreement.

objector's fee that is to be placed in escrow, provides a far more appropriate accommodation of the interests identified by the Court in agency shop cases.[20]

CONCLUSION

For the above-stated reasons, the Court should reverse the judgment below, and hold that the 100% escrow procedure used by petitioners is constitutionally sufficient, but not constitutionally necessary.

Respectfully submitted,

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[20] Several lower courts have upheld the constitutionality of the NEA procedure. *See, e.g., Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3599 (Feb. 19, 1985); *Dolan v. Rockford School District*, No. 84-20209 (N.D. Ill., Feb. 28, 1985); *Board of Education of Boonton v. Kramer*, —— A.2d ——, 119 LRRM 3354 (N.J. S.Ct., June 25, 1985). *See also Tierney v. City of Toledo*, 116 LRRM 3475 (N.D. Oh. 1984) (upholding identical procedure implemented by another union).